No. 91-542

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ELLIS B. WRIGHT, JR., *et al.*,

Petitioners,

—v.—

FRANK ROBERT WEST, JR.,

Respondent.

ON WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF VIRGINIA IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI[1]

The American Civil Liberties Union is a nationwide, nonpartisan organization of nearly 300,000 persons, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The ACLU of Virginia is one of its statewide affiliates.

The ACLU has long worked to protect the rights of criminal defendants and their access to the federal courts and has filed many briefs, as direct counsel or as *amicus curiae*. We respectfully submit this brief *amicus curiae* because the resolution of this case may well affect the continued availability of the federal courts as a meaningful forum for the correction of constitutional errors by state tribunals.

STATEMENT OF THE CASE

Respondent, Frank West, was convicted of larceny in Westmoreland County, Virginia. Under Virginia law, the jury was permitted to infer from West's possession of stolen property that he, in fact, had stolen it. On appellate review in state court and in state habeas corpus proceedings, West claimed that the evidence introduced against him at trial was insufficient to support conviction beyond a reasonable doubt under this Court's decision in *Jackson v. Virginia*, 443 U.S. 307 (1979). He raised the same claim in a federal habeas corpus petition. The district court denied relief, but the United States Court of Appeals for the Fourth Circuit concluded that the *Jackson* claim was meritorious and awarded relief.

The warden sought a writ of *certiorari* on two questions: (1) whether a federal court could award habeas corpus relief "merely because it disagree[d]" with the

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

"good faith reasonable decision of the state courts," and (2) whether the Fourth Circuit's decision "fundamentally alter[ed]" the standard in *Jackson* inasmuch as it "vacat-e[d] a state conviction" on the basis of "nothing more" than "concern" about "a deeply-rooted common law principle that the prisoner never raised in state court."

When this Court granted review, it asked the parties to brief a third question: whether the federal habeas courts generally should defer to state court applications of law to the facts of specific cases. This brief concentrates on this third question, put by the Court itself.

SUMMARY OF ARGUMENT

The question on which this Court has called for briefs is controlled by explicit jurisdictional statutes stretching back to Reconstruction. The 1867 Habeas Corpus Act conferred jurisdiction on the federal courts to entertain petitions from state prisoners and to award relief to any prisoner whose detention is found to violate federal law. In *Brown v. Allen*, 344 U.S. 443 (1953), this Court construed the 1867 Act to require the federal habeas courts to exercise independent judgment on the application of legal standards to the facts of specific cases.

In amendments to the statutes in 1966, Congress acted on the premise established in *Brown*. There can be no question that the 1966 legislation codified yet again the federal courts' longstanding authority to make independent judgments on prisoners' federal claims, notwithstanding previous judgments in state court.

The Commonwealth of Virginia and some other *amici* disapprove Congress' political decision to confer on the federal courts the authority to review state court applications of law to fact *de novo*. They have tried for years to persuade Congress to change its policy in this respect, but they have failed. Now they ask this Court to substitute its own policy prescription for that of Congress

and, effectively, to challenge Congress to reenact its position yet again -- this time by enough votes to override a presidential veto.

The Court cannot permit itself to be used in this way without violating Congress' authority under Article III of the Constitution to determine the jurisdiction that the federal courts shall have. This Court cannot validly invade the prerogatives of the political branch; it cannot legislate *for* Congress. Rather, under the separation-of-powers principle, the Court must accept Congress' policy choices.

The effects of establishing a rule of deference in law-application cases would be either to eliminate federal habeas corpus for state prisoners or to saddle the federal courts with burdensome duties of questionable value. Either the federal courts would routinely give state judgments preclusive effect, or they would attempt to enforce a shadow set of standards that track with, but do not match, the set of correct results that should be reached on prisoners' claims. Those shadow standards would function only in habeas corpus and, in this context, would mark the limits of just *how* wrong the state courts can be without triggering corrective federal action.

There is no analogy to cases in which state executive officers are permitted to assert a "good faith" defense to suits for damages. Judges are professionals, charged to make judicial decisions about rights. They are used to being reviewed by other courts. Executive officers are allowed a "good faith" defense to actions for damages in order that the threat of personal liability will not deter them from seeking public jobs or performing their duties properly. State judges do not expose themselves to personal liability when they decide cases and thus require no similar protection.

Nor is there any analogy to cases in which the federal courts defer to administrative agency interpretations

of the statutes they administer. Agency judgments receive deference because of agency accountability, expertise, and capacity, or because Congress has prescribed that their decisions should be respected. The state courts have no special expertise or capabilities in constitutional adjudication. Moreover, Congress has expressed no intent to assign them responsibility for federal claims. Rather, Congress has conferred jurisdiction on the federal courts to adjudicate federal claims afresh -- independently applying legal standards to the facts.[2]

ARGUMENT

I. A FEDERAL HABEAS CORPUS COURT SHOULD NOT DEFER TO A STATE COURT'S APPLICATION OF LAW TO FACT

A. The Habeas Corpus Statutes Require The Federal Courts To Make *De Novo* Determinations Of Prisoners' Legal Claims

The question on which the Court has called for briefs is controlled by explicit jurisdictional statutes, consistently construed by this Court to mean that the federal courts must exercise *de novo* judgment on the application of law to the facts of specific cases. If this clearly established aspect of federal jurisdiction is to be changed, it is Congress, not this Court, which must act.

The federal courts have had jurisdiction to issue the writ of habeas corpus since the first Judiciary Act of 1789, 1 Stat. 81-82. Their authority to issue the writ on behalf of prisoners in state custody dates from Reconstruction. Immediately following the Civil War, Congress promulgated the Fourteenth Amendment and enacted a series of civil rights laws to protect individuals against state, rather than national, governmental power. Simultaneously, Congress created new procedural mechanisms for the enforcement of the new substantive rights. Habeas corpus for prisoners in state custody, established by the Habeas Corpus Act of 1867, 14 Stat. 385, was one such mechanism. Taken together, those Reconstruction enactments effected a "vast transformation from the concepts of federalism that had prevailed in the late 18th century." *Cf. Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

The fundamental purpose of habeas corpus for state prisoners, civil rights actions for violations of the Constitution under color of state law, and other new procedures and jurisdictional provisions, was self-evident:

> Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; *it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.*

Id. (emphasis added).

When the habeas corpus bill was introduced in the House of Representatives, the floor manager, Rep. William Lawrence of Ohio, explained that it would enable the federal courts to "enforce the liberty of all persons" and that it would establish power in the federal courts "coextensive with all the powers that can be conferred on them." Cong. Globe, 39th Cong., 1st Sess. 4151 (1866). In the Senate, Senator Lyman Trumbull explained that the bill would fill a gap in the habeas jurisdiction that had existed since 1789. Under the original act, the fed-

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[2] To avoid duplication, we adopt by reference the argument set forth in the *amicus* brief of the American Bar Association that neither *Teague v. Lane*, 489 U.S. 288 (1989), nor any of its progeny, affect the jurisdiction of the federal courts to apply their independent judgment to appropriately raised legal claims in habeas proceedings.

eral courts could receive petitions only from prisoners held in federal custody; under the new law, the federal courts would be able to entertain applications from state prisoners, provided they attacked their custody as in violation of federal law. Cong. Globe, 39th Cong., 1st Sess. 4229 (1866).[3]

This Court promptly said that the 1867 Act was of "the most comprehensive character . . . and that [i]t is impossible to widen this jurisdiction." *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 325-26 (1869).

The language of the 1867 Act construed in *McCardle* has not changed in more than a century:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions . . . .
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless --
>
> 3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . .

28 U.S.C. §2241.

Nearly forty years ago, in *Brown v. Allen*, 344 U.S. 443, Justice Reed's opinion for the Court read the same statutory language[4] to require independent federal adjudication of prisoners' federal claims, notwithstanding previous state judgments:

> [T]he state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort in another jurisdiction on federal constitutional issues. It is not *res judicata*.

Id. at 458.

This passage from Justice Reed's opinion has always been read to answer the question now before the Court:

> *Brown v. Allen* squarely established . . . that federal constitutional questions litigated fully and fairly in state criminal cases are subject to collateral review on habeas corpus . . . . Insofar as Justice Reed's ambiguous language casts doubts on this proposition, the point is definitively established by his exhaustive review of the merits of *Brown*'s constitutional claims, and by Justice Frankfurter's opinion in the case.[5]

Justice Frankfurter's opinion, joined by a majority of the Court in *Brown*, explicitly interpreted the statute to require the federal courts to exercise *de novo* judgment

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[3] It has been suggested that the 1867 Act had a more limited purpose. Mayers, "The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian," 33 U.Chi.L.Rev. 31 (1965). That thesis will not withstand scrutiny. *See* Yackle, "Form and Function in the Administration of Justice: The Bill of Rights and Federal Habeas Corpus," 23 U.Mich. J.L.Ref. 685, 695-700 (1990).

[4] Just prior to *Brown*, Congress had codified the so-called "exhaustion doctrine," which generally requires state prisoners to present their federal claims to the state courts before applying for a federal writ of habeas corpus. *See Ex parte Royall*, 117 U.S. 241 (1886). The amendment in 1948 included only what are now subsections (b) and (c) of §2254. The substantive language that now appears in subsection (a) was not enacted until 1966. In *Brown*, then, the Court dealt only with the language in the original 1867 Act, §2241. The later addition of §2254(a), after both *Brown* and the Court's decisions in 1963, constitutes a congressional enactment of *Brown*'s authoritative construction of the original Act.

(continued...)

(...continued)

[5] P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, Hart & Wechsler's *The Federal Courts and the Federal System* 1487 & n.1 (3d ed. 1988).

regarding the application of law to fact:

> Where the ascertainment of the historical facts does not dispose of the claim but calls for *interpretation of the legal significance of such facts* . . . the District Judge *must exercise his own judgment on this blend of facts and their legal duties. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge* . . . .

344 U.S. at 507-08 (opinion of Frankfurter, J.)(emphasis added).

In the immediate wake of *Brown*, the Court confirmed this interpretation. *E.g., Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963); *Sanders v. United States*, 373 U.S. 1 (1963).[6] The same interpretation has been repeated in cases in which the Court has identified nonfederal or procedural grounds for withholding federal judgment on the merits. The Court has taken pains to make clear that, if the merits were open for consideration, the federal courts would make their own, independent decisions:

> [T]he federal habeas petitioner who claims he is detained pursuant to a final judgment of a state court in violation of the U.S. Constitution is entitled to have the federal habeas court make its own independent determination of his federal claim, without being bound by the determination on the merits of that claim reached in state proceedings.

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[6] Even Justice Harlan, who dissented in *Noia*, *Townsend*, and *Sanders*, recognized that, under *Brown*, when the merits were not procedurally foreclosed, a federal habeas court "had the right and duty *to satisfy itself of the correctness of the state decision*." *Noia*, 372 U.S. at 461 (emphasis added).

Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

Congress, too, has reaffirmed *Brown*. In 1966, Congress added the following new subsection to §2254 of the habeas chapter:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

In this new language, Congress codified yet again the federal courts' authority to make independent judgments on state prisoners' federal claims notwithstanding previous judgments in state court.[7]

B. The Responsibility Under The Constitution To Prescribe The Federal Courts' Jurisdiction Is Committed To Congress

Controlling habeas corpus statutes require the federal courts to make their own independent determinations

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[7] Other amendments in 1966 are to the same effect. In a new subsection (d) added to §2254, for example, Congress established a presumption in favor of state findings of basic fact found after adequate state court hearings. The clear implication was that state court conclusions regarding legal issues, or the application of legal standards to primary facts, would not be entitled to similar deference in federal court. *Miller v. Fenton*, 474 U.S. 104 (1985)(holding that the voluntariness of a confession is a mixed question of law and fact to which the statutory presumption for findings of basic fact is inapplicable); *Sumner v. Mata*, 455 U.S. 591, 597 (1982)(confirming that the "ultimate question" of a prisoner's entitlement to relief on a claim is not a question of basic fact under the statute). *See also* 28 U.S.C. §2244(b)-(c) (establishing deference rules for prior *federal* court judgments on claims and thus recognizing that previous *state* court judgments are not entitled to deference).

of the legal claims raised by state prisoners. The *de novo* application of relevant legal rules to the basic facts of particular cases constitutes the principle element of that adjudicative function. Accordingly, the Court is not free to decide that the federal courts should defer to state applications of law to fact. To do so would violate Congress' authority to prescribe the federal courts' jurisdiction under Article III of the United States Constitution. *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850).

In this instance, Congress has acted to ensure that individual rights are protected by independent federal courts. If the Court fails to give effect to the majority will reflected in that political judgment, it will not be checking a threat *to* individual liberty posed by majoritarian power but, instead, will be frustrating the authority of the legislative branch to *safeguard* individual rights by according those rights effective, independent tribunals for their determination.

The Commonwealth of Virginia and the *amici* supporting reversal in this case baldly ask the Court itself to establish a radically different standard of review for the federal courts in habeas cases -- as though the scope of the habeas jurisdiction were not controlled by statute. Astonishingly, the Court is invited simply to ignore the decisions that Congress has reached within its constitutional authority. It is as though there were no statute or, indeed, as though there were no Congress.

The Department of Justice and many of the state attorneys general who appear as *amici* in this case have long pressed Congress to limit, or even to eliminate, habeas corpus for state prisoners. Introducing a bill to the Senate more than ten years ago, Attorney General Smith declared:

> [T]here is no justification in the present day for the availability of federal habeas corpus as a routine means of review of state criminal convictions . . . .
>
> [Habeas corpus should only be a] backstop or fail-safe mechanism to guard against the rare instances in which state courts may have acted in defiance or disregard of federal law.

Letter from William French Smith to George Bush, President of the U.S. Senate, March 3, 1982, *cited in* Yackle, "The Reagan Administration's Habeas Corpus Proposals," 68 Iowa L.Rev. 609, 614 (1983).

Among other things, the bill Mr. Smith urged on Congress would have barred the federal courts from awarding relief on any claim that had previously been "fully and fairly adjudicated" in state court. S.2216, 97th Cong., 2d Sess. §5 (1982).[8] The Attorney General was perfectly candid regarding the purpose of this "full-and-fair-adjudication" standard. He said the intent was to "repeal" the federal courts' authority to review the "legal and mixed legal-factual determinations of State courts." 128 Cong. Rec. S265 (Feb. 2, 1982).

Congress declined to make any such radical changes in the federal courts' habeas jurisdiction. Nevertheless, the Justice Department has continued its relentless pursuit of new legislation that would force the federal courts to defer to the state courts on law-application issues.[9] In

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[8] *See* The Habeas Corpus Reform Act of 1982: Hearings on S.2216 Before the Committee on the Judiciary, 97th Cong., 2d Sess. (1982).

[9] Occasionally, strategists in the Department have taken an even more radical position:

> Attorney General Smith suggested that the optimum solution to the problems of federal habeas corpus jurisdiction would be *the enactment of legislation abolishing federal habeas corpus as a post-conviction remedy for state prisoners. We agree*.

(continued...)

each of the last three Congresses, the Justice Department has pressed the same "full-and-fair-adjudication" program on the legislative branch. Always the objective has been the same: to restrict the federal courts' authority independently to apply federal law to the facts of particular cases. In a commentary accompanying the current version of the plan, the Department states flatly that the purpose of the "full-and-fair-adjudication" standard is to overrule *Brown v. Allen*, 344 U.S. 443, and to substitute "a more limited standard of review."[10]

Some state attorneys general have also lobbied Congress for similar legislation, and joined the Justice Department to testify before congressional committees on behalf of measures that would have the federal courts defer to state court judgments. For example, Attorney General Lungren of California recently had this to say to the Senate:

> [W]e are concerned with reforming the *statutory* [emphasis in original] writ of habeas corpus, a non-constitutional post-conviction remedy that has been *created by Congress* and expanded through judicial construction. Therefore, *only the Congress* can repair the problems of delay and lack of finality which we are experiencing under our habeas corpus process . . . .

Hearings on S.635 Before the Committee on the Judiciary, 102d Cong., 1st Sess. 9 (1991)(typescript statement) (emphasis added).

There is nothing illegitimate in any of these approaches to Congress. The Justice Department and state attorneys general are entitled to recommend legislation -- as are all Americans. Yet the Court cannot blink reality. Numerous legislative battles have been fought over habeas corpus policy, and, indeed, continue to be fought this spring. Thus far, those who have sought a rule of deference to the state courts have been unsuccessful. Accordingly, political losers have simply crossed the street in hopes that this Court will give them the victory they could not achieve in the legislative branch.[11]

In effect, Virginia and other *amici* want the Court to substitute its own policy prescription for that of Congress and thus to challenge Congress to reassert its authority by reconfirming the federal courts' authority in habeas corpus -- this time by enough votes to override a presidential veto.[12] Time and again in recent years, this Court

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[9] (...continued)
U.S. Department of Justice, Office of Legal Policy, Report to the Attorney General, Federal Habeas Corpus Review of State Judgments vi (1988)(emphasis added).

[10] U.S. Department of Justice, The Comprehensive Violent Crime Control Act of 1991: A Summary 25 (1991). Before congressional committees, representatives of the Department have urged Congress to establish "an appropriate standard of deference to state court legal rulings *and the application of law to fact*." Hearings on H.R.1400 Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, 102d Cong., 1st Sess. 7 (1991)(typescript statement of Andrew McBride, Associate Deputy Attorney General) (emphasis added).

[11] During the Nixon Administration, the Justice Department urged the Judicial Conference Subcommittee on Habeas Corpus to consider three alternative plans in 1971, one of which was explicitly presented as overruling *Brown v. Allen*. Recognizing the need for legislative action, however, the Department did not ask this Court itself to jettison *Brown*. *See generally* Remington, "State Prisoner Access to Postconviction Relief -- A Lessening Role for Federal Courts; An Increasingly Important Role for State Courts," 44 Ohio St.L.J. 287, 293 (1983) (referring to correspondence from William H. Rehnquist, then Assistant Attorney General). Instead, several years later, the Justice Department supported legislation that would have restricted federal habeas corpus to claims going to the "reliability of the factfinding process." S.567, 93d Cong., 1st Sess. (1976).

[12] Many of the state attorneys general who appear as *amici* here have (continued...)

has made it crystal clear that it will not permit itself to be used in this way. Even if the Court doubts the wisdom of the course Congress has chosen, the Court is duty-bound to respect political judgments duly reached by the legislative branch. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978).[13]

Particularly in cases in which this Court has given a federal statute an authoritative interpretation, and Congress has had ample time and opportunity to reject that interpretation if it chooses, this Court has always been unwilling itself to make a change that Congress has failed to make. As Justice Kennedy said for the Court in *Hilton v. South Carolina Public Railways Commission*, __ U.S. __, 112 S.Ct. 560, 564 (1991)(citations omitted):

> 'Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done' . . . .
>
> Congress has had almost 30 years in which it could have corrected our decision in Parden if it disagreed with it, and has not chosen to do so. We should accord weight to this continued acceptance of our earlier holding.

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[12] (...continued)
urged the President to veto the pending crime bill on this basis. The President has threatened such a veto. N.Y. Times, Nov. 27, 1991, at A1.

[13] Only a few weeks ago, Justice Thomas' opinion for a unanimous Court in *Mozof v. United States*, __ U.S. __, 112 S.Ct. 711, 715 (1992), rejected the Government's reading of a federal statute, because it was "contrary to the statutory language." *Cf. Bob Jones University v. United States*, 462 U.S. 574, 622 (1983)(Rehnquist, J., dissenting)(stating that the Court should not "legislate *for* Congress")(emphasis added).

One could scarcely find a case closer to *Hilton* on this point than the present case. Here, as in *Hilton*, the Court has previously interpreted a federal statute in a way that has proved to be controversial in some quarters; here, as in *Hilton*, Congress has had decades to change the law. Yet Congress has *not* overruled *Brown v. Allen* legislatively, and this Court cannot jettison that authoritative interpretation of the habeas statutes without doing violence to the separation of powers.

In fact, Congress has constantly debated proposals to overhaul habeas corpus. The decision in *Brown* has always been featured prominently in those debates. When federal statute law has "seen careful, intense, and sustained congressional attention," any change in existing law "must come from Congress, rather than from this Court." *Square D. Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 424 (1986).[14]

It is inconceivable that this Court would now frustrate a congressional policy so ancient, so hard-fought, and so many times reaffirmed. There is only one appropriate answer to the question now at bar. Congress has decided that the federal courts will apply the law to the facts of particular cases, and this Court must respect that decision.

II. INDEPENDENT REVIEW IN FEDERAL HABEAS CORPUS IS AN ESSENTIAL ELEMENT OF THE MACHINERY OF AMERICAN JUSTICE

There is a reason why Congress has long provided for independent federal jurisdiction in habeas corpus.

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[14] There is nothing new in this. When Congress reenacts a statute after considering existing interpretations of it "in great detail," the Court has always concluded that Congress means to embrace those interpretations. *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951). In this instance, Congress clearly assumed the continued force of *Brown* when it wrote the 1966 amendments to the habeas statutes.

De novo adjudication in federal court is a theoretically sound and effective element of the machinery of American justice.

Many of the provisions of the Bill of Rights are procedural safeguards in criminal cases; most criminal prosecutions are conducted in state court. If the Bill of Rights is to receive an authoritative, uniform interpretation, either this Court must sit as a court of error for fifty different state judicial systems, or there must be some alternative means by which the state courts and the lower federal courts can winnow the crop of cases competing for attention. The first of these is infeasible; the second is federal habeas corpus.[15]

The current system sensibly allocates responsibility between the state and federal courts in a manner that either achieves substantial agreement on federal questions or lays the predicate for this Court to settle important divisions of opinion. In the main, initial fact-finding is assigned to the state courts.[16] Inasmuch as the exhaustion doctrine requires prisoners to present their federal claims in state court, by the time a case reaches federal habeas corpus the state courts usually have held hearings, taken testimony, and established a reliable factual record on which legal judgment can rest.

By contrast, the federal courts rightly exercise fresh judgment regarding the legal significance of the factual

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[15] It is partly because the federal habeas courts can correct state court errors of federal law that Congress has found it unnecessary to establish routine removal jurisdiction for the initial trial of state criminal cases in the federal forum. *Cf.* Mishkin, "The Federal Question in the District Courts," 53 Colum.L.Rev. 157, 172 n.70 (1953). Moreover, the availability of habeas corpus in the district courts has become all the more important with the elimination of most of this Court's obligatory appellate jurisdiction. Review of Cases by the Supreme Court, Pub.L. 100-352, 102 Stat. 662 (1988).

[16] 28 U.S.C. §2254(d).

record. While they can, do, and should take account of the state courts' determinations of legal issues and "mixed" questions of law and fact, they have authority to make their own, independent assessments.

For decades now, the writ has been the principal means by which the federal courts enforce the Bill of Rights in state criminal cases. Almost seventy years ago, in *Moore v. Dempsey*, 261 U.S. 86 (1923), the Court rejected Justice McReynolds' argument that the conviction of five black farmers must be sustained because the Arkansas courts had decided that their trial had been sufficient. The decision in *Moore* was written by Justice Holmes and echoed his dissent in *Frank v. Mangum*, 237 U.S. 309, 346 (1915), one of the most egregious cases of antisemitism in American history:

> *[H]abeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry into whether they have been more than an empty shell.

The adoption of a rule requiring the federal courts to defer to state court applications of law to fact would break faith with a hallowed American tradition in which Article III courts have long safeguarded citizens' federal rights. The issue before the Court is no dry question of efficient judicial process in the federal system, no neutral matter of comity and respect for state court judgments. It goes to the structural role of the federal courts in the protection of individual liberty in a post-Reconstruction world in which the Constitution has undergone fundamental transmutation and now limits state, as well as national, governmental power. This question is basic. On its resolution turns Congress' ability to ensure the availability of federal remedies for federal rights.

III. ALTERNATIVES TO *DE NOVO* REVIEW WOULD BE EITHER UNWORKABLE OR INAPPROPRIATE

A. The Effects Of A Deference Rule

A rule requiring the federal courts to defer to state court judgments applying law to facts would have one of two effects. Either it would effectively eliminate federal habeas corpus as a substantive check on the validity of state prisoners' custody, or it would saddle the federal courts with burdensome duties of questionable value -- adding to, rather than mitigating, the very problems that such a rule would presumably be meant to solve.

In most instances, the application of law to primary facts constitutes the core of the judicial function. By comparison, the identification of the abstract legal principles applicable to a case, important as it may be, is typically a relatively simple matter -- guided by this Court's precedents. Accordingly, in order to perform as the independent courts they are, the federal courts in habeas corpus are rightly expected to exercise independent judgment regarding the application of relevant legal standards.

Under any deference standard the Court might select, the federal courts would understand that their role is to be fundamentally different from what it is now. Told to deny federal relief even when they believe a prisoner's claim to be meritorious, the federal courts would have to distinguish between error that is sufficiently mild to be ignored and error that is sufficiently grave to warrant federal correction. Despite attempts to locate some middle ground between considering claims *de novo* and giving state judgments preclusive effect, a slide to the latter extreme is entirely predictable.[17]

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[17] To paraphrase Justice Scalia in another context, the federal courts (continued...)

Experience in the wake of *Stone v. Powell*, 428 U.S. 465 (1976), provides a telling illustration. The Court held in *Stone* that the federal courts should not award relief on the basis of the Fourth Amendment exclusionary rule, unless the state courts failed to give the prisoner an adequate opportunity to litigate such a claim. The district courts have consistently understood *Stone* to mean that they should not ordinarily reexamine state applications of the Fourth Amendment to the behavior of the police in particular cases. The result is that federal enforcement of the exclusionary rule in habeas corpus is now a dead letter. The only remaining federal forum for search-and-seizure claims by state prisoners is in this Court on direct review.

Of course, it is well settled that *Stone* elaborated on the exclusionary rule, rather than the district courts' jurisdiction in habeas corpus. *Stone*, 428 U.S. at 494-95 n.37.[18] Nevertheless, the lesson to be drawn from that case is pertinent here. If this Court reinterprets the ha-

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[17] (...continued)
might be concerned lest the term "deference" standing alone should come to mean very little -- a "mealy-mouthed" word used to suggest that a previous judgment is examined "with attentiveness and profound respect" when, in fact, it is being ignored. Scalia, "Judicial Deference to Administrative Interpretations of Law," 1989 Duke L.J. 511, 516. To guard against that result, the federal courts might overcompensate and give a previous judgment *binding*, i.e., preclusive, effect. If the Court decides in this case that the federal courts are to defer to state court judgments on *some* standard, the Court must recognize that the likely result will be the end of any serious federal adjudication at all.

[18] Since the Court has concluded that the enforcement of the exclusionary rule in habeas corpus would not significantly deter police misconduct in the field, *Stone* simply instructs the district courts not to invoke that rule in habeas. *See Allen v. McCurry*, 449 U.S. 90, 98 (1980). Despite arguments that a similar analysis should be applied to other judge-made rules or constitutional claims, the Court has held *Stone* to its narrow, exclusionary rule context -- for the very reason that an extension would be irreconcilable with the controlling statute. *Rose v. Mitchell*, 443 U.S. 545 (1979).

beas corpus statutes to require the federal courts to defer to state court applications of law to fact with respect to *all* claims, federal habeas corpus for state prisoners may effectively be at an end. This is not hyperbole. It is a candid observation grounded in recent experience.[19]

The application of a deference rule in this very case would generate yet another illustration. Respondent's federal claim is that the evidence against him at trial was insufficient under this Court's decision in *Jackson v. Virginia*, 443 U.S. 307. Under *Jackson*, no court (state or federal) is warranted in upsetting a jury's decision, unless "viewing the evidence in the light most favorable to the prosecution," the court concludes that no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. Accordingly, when respondent raised his claim in the state courts of Virginia, those courts were obliged *by the terms of* the claim itself to defer to any jury verdict within reason.

If the federal courts were, in turn, instructed to defer to "reasonable" state court judgments, the result would be difficult to defend as sensible law. A federal court would be able to award relief only if it concluded that the state courts acted unreasonably in concluding that the jury acted reasonably in deciding that there was no reasonable doubt regarding the prisoner's guilt. It

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[19] The Solicitor General insists that the state courts are able to enforce the exclusionary rule and that the oversight previously provided by the federal habeas courts may actually have created a perverse incentive in the state courts to relax their vigilance. Brief for the United States at 16. Neither evidence nor logic supports that hypothesis. If anything, the ability of prisoners to seek relief on exclusionary rule claims prior to *Stone* presumably encouraged the state courts to respect Fourth Amendment rights in order to protect their judgments. In *Stone* itself, of course, the Court recognized that *some* deterrent impact might be gained by enforcing the exclusionary rule in habeas, but concluded that that *positive* incentive was outweighed by the costs.

would be patently absurd to bury federal rights under the weight of multiple checks for "reasonable" error. Both the judicial system and the rights that system is meant to protect would be done a disservice.[20]

The implications of a deference rule would be no less troubling in the unlikely event the federal courts *were* able to stake out a middle ground between *de novo* adjudication and preclusion. Under any review standard, the district courts would continue to receive petitions, study the relevant materials, resolve procedural issues, and make judgments. Habeas corpus for state prisoners would look largely the same as it does now. It would not be the same, however, in that the federal courts would no longer invest resources in the identification and cure of constitutional error. Instead, they would elaborate a shadow set of standards that track with, but do not match, the set of correct results that should be reached on prisoners' federal claims. Those shadow standards would function only in habeas corpus and, in this context, would mark the limits of just *how* wrong the state courts can be without triggering corrective federal action.[21]

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[20] *Cf. Dewsnup v. Timm*, __ U.S. __, 112 S.Ct. 773, 783 (1992)(Scalia, J., dissenting)(urging the Court to "avoid construing [a] statute in a way that produces . . . absurd results"). A similar result might follow from the adoption of a standard barring federal relief on a claim that was "fully and fairly adjudicated" in state court. After all, "full and fair adjudication" is the standard associated with preclusion under the full faith and credit statute. 28 U.S.C. §1738. *Kremer v. Chemical Const. Corp.*, 456 U.S. 461 (1982). Habeas has always been an express statutory exception to §1738. *Id.* at 485 n.27; *accord Allen v. McCurry*, 449 U.S. at 98 n.12 (1980).

[21] *Cf. Molzof v. United States*, 112 S.Ct. at 717 (rejecting the Government's reading of a statute because it would be "difficult and impractical to apply"). It is ludicrous for Virginia to propose that, by telling the federal habeas courts to defer to "reasonable" state judgments, the Court would be establishing an easily applied "bright line" test. Brief

(continued...)

Either way, moreover, if the federal courts were instructed to defer to state court applications of law to fact, they would find themselves searching petitions for evidence of a state court's willful refusal to respect constitutional rights. Everyone who has studied these problems hopes and believes that cases of that kind are extremely rare. A head of federal jurisdiction that is maintained only to search out such cases would be offensive to the state courts by its very existence. Some state judges may think that their judgments should not be subject to reexamination in federal habeas. Yet all judges are familiar with some manner of review for error. A system whose only reason for being is to catch unreasonable and abusive state decisions is quite another matter. One can scarcely think of a framework more likely to generate friction.

B. The Analogy To Suits For Damages

Some observers suggest that the federal courts should defer to "reasonable" or "good faith" state court applications of law to fact by analogy to cases in which state executive officers are permitted to assert a "good faith" defense in civil suits for damages. That argument is seriously misconceived.

There is no comparison between the ability of state judges to know and correctly apply the Constitution and

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[21] (...continued)
for Petitioner at 22. A "reasonableness" standard would be an administrative nightmare for the district courts, generating a rash of conflicting precedents in indistinguishable cases. A core element of federal justice -- uniformity in the articulation and enforcement of constitutional rights -- would be sacrificed. That, in turn, would break faith with the common understanding that the Bill of Rights establishes a consistent shield for liberty that cannot be permeated by regional prejudice. It is no answer that this Court would retain jurisdiction to review state and federal habeas corpus judgments directly. *Certiorari* review here is impractical in all but a handful of cases.

the capacity of executive officers to assess whether their behavior in the field comports with federal law. Judges are judges: professionals educated in the law, prepared and equipped to preside over legal proceedings, to take evidence, to hear argument, and to make careful judgments in light of available legal materials. Executive officers, by contrast, are typically nonprofessional agents, trained to follow departmental rules and practices, but unable to duplicate the deliberations that inform judicial proceedings.

The Court has often articulated its reasons for recognizing a "good faith" defense on the part of state executive officers sued for damages. *See Anderson v. Creighton*, 483 U.S. 635 (1987). Principally, the Court has been concerned that the threat of personal liability for actions taken in the line of duty may deter qualified men and women from seeking public jobs or performing their duties properly. Those reasons simply do not obtain with respect to erroneous, but "good faith," state court judgments on federal claims, which involve no personal exposure for the state judges concerned.[22]

One court's examination of the legal conclusions reached by another is a familiar feature of American justice. All judges occasionally make mistakes, and when they do their judgments may be upset; they expect this and should not take personal offense when it happens. While this Court properly takes potential friction between the federal and state courts into account in fashioning standards for the exercise of federal judicial power, the Court cannot restrict the scope of federal jurisdiction to accommodate outsized state court sensitivities -- even if they can be shown to exist.

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[22] This distinction is implicit in the Court's holding that judges are absolutely immune from suits for money damages, *Pierson v. Ray*, 386 U.S. 547 (1967), but may be sued for declaratory and injunctive relief, *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980).

C. The Analogy To Judicial Review Of Administrative Action

Nor is there any fair analogy between the question here and the deference the federal courts routinely give to federal agencies' interpretations of the statutes they administer and the application of those statutes to particular fact patterns.

The Court has held that in cases in which there is ambiguity, the federal courts should accept agency determinations that are "reasonable" or "permissible" in light of the federal statute under examination. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 838 (1984); Scalia, *supra* at 512. The reasons for that deference occur on two levels. First, agency judgments have been thought to be entitled to deference because of administrative agencies' political accountability, expertise, and ability to orchestrate complicated regulatory schemes. Second, agency judgments have been accorded deference to give effect to congressional intent. Scalia, *supra*.

Those reasons do not obtain with respect to state court determinations of federal constitutional claims. The state courts have no special expertise or capabilities in constitutional adjudication. If any courts have a comparative advantage in this respect, it is the independent courts established under Article III. Moreover, Congress has expressed no intent to assign responsibility for constitutional cases to the state courts. As explained above, Congress has conferred jurisdiction on the federal habeas courts to adjudicate federal claims afresh -- independently applying legal standards to the facts of individual cases.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

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